Supreme Court, U.S.
FILED

No. 09-1262

091418 MAY 20 2010

IN THE

# Supreme Court of the United States

OFFICE OF THE CLERK

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HER HUSBAND JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

*Petitioners*,

v.

TALISMAN ENERGY INC.,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. CYR *
MARC J. GOTTRIDGE
SCOTT W. REYNOLDS
ANDREW M. BEHRMAN
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
joe.cyr@hoganlovells.com

* Counsel of Record

*Counsel for Respondent*

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

## QUESTIONS PRESENTED

1. Whether federal courts lack subject matter jurisdiction under the Alien Tort Statute to impose liability on corporations for torts committed in violation of customary international law, given that no international law norm recognizing corporate liability has been "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [this Court has] recognized." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

2. Whether federal courts lack subject matter jurisdiction to apply the Alien Tort Statute extraterritorially to claims for violations of customary international law arising entirely outside the United States.

3. Whether the courts below erroneously created causes of action for violations of customary international law where (i) the claims are based on events arising solely outside the United States and had no effect on the United States whatsoever, (ii) the claims are asserted against a foreign defendant not in the custody of the United States and (iii) a country providing an adequate alternative forum has a close nexus to the dispute.

## PARTIES TO THE PROCEEDING

All parties are listed in the caption.

## *RULE 29.6* STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, respondent Talisman Energy Inc. states that it is a nongovernmental corporate party that has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| RULE 29.6 STATEMENT | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION | 8 |
| I. CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL LAW UNDER THE ATS IS A FUNDAMENTAL JURISDICTIONAL QUESTION. | 9 |
| II. CORPORATE LIABILITY IS NOT RECOGNIZED IN INTERNATIONAL LAW | 11 |
| III. THE EXTRATERRITORIAL APPLICATION OF THE ATS IS A FUNDAMENTAL JURISDICTIONAL QUESTION. | 14 |
| IV. THE ATS DOES NOT APPLY TO ALLEGED TORTS IN VIOLATION OF INTERNATIONAL LAW COMMITTED IN THE SOVEREIGN TERRITORY OF ANOTHER STATE. | 15 |

TABLE OF CONTENTS—Continued

Page

V. ADJUDICATING IN THE UNITED STATES ATS CLAIMS AGAINST FOREIGN DEFENDANTS ARISING FROM CONDUCT WHOLLY OUTSIDE THE UNITED STATES IS INCONSISTENT WITH INTERNATIONAL LAW AND *SOSA* ..... 17

CONCLUSION ..... 23

TABLE OF AUTHORITIES

CASES — Page

*Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008) ..... 10
*Abdullahi v. Pfizer Inc.*, 562 F.3d 163 (2d Cir. 2009) ..... 10
*Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) ..... 11
*Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007) ..... 11
*EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) ..... 15
*F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ..... 19
*Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) ..... 11
*Foley Bros. v. Filardo*, 336 U.S. 281 (1949) ..... 15
*In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) ..... 13
*Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) .....9, 11, 13, 14, 17
*Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ..... 17
*Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009) ..... 22
*Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) ..... 11
*Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) ..... 11
*Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) ..... 10
*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

*The Paquete Habana*, 175 U.S. 677 (1900) ... 14
*Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008) ... 11

STATUTES

28 U.S.C. § 1254(1) ... 2
28 U.S.C. § 1350 ... *passim*

RULES AND REGULATIONS

Fed. R. Civ. P. 54(b) ... 7

OTHER AUTHORITY

Albin Eser, Individual Criminal Responsibility, in 1 Antonio Cassese *et al.*, The Rome Statute of the International Criminal Court: A Commentary 767, 778-79 (Oxford Univ. Press 2002) ... 13
Brief for The United States as *Amicus Curiae* in Support of Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, App. 3a-4a, 128 S.Ct. 2484 (Mem.) (2008) (No. 07-919) ... 14-15
ICTR Statute, art. 5, S.C. Res. 955, U.N. S/RES/955 (Nov. 8, 1994) ... 12
ICTY Statute, art. 6, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) ... 12
J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893) ... 16
John H. Currie, Public International Law 308 (2001) ... 19

TABLE OF AUTHORITIES—Continued

Page

London Charter, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288 ..... 12

Restatement (Third) of the Foreign Relations Law of the United States § 402 (1986) ..... 18

Restatement (Third) of the Foreign Relations Law of the United States § 404 (1986) ..... 19

Restatement (Third) of the Foreign Relations Law of the United States § 421(1) (1986) ..... 19

Restatement (Third) of the Foreign Relations Law of the United States § 421(2)(c) (1986) ..... 21

Rome Statute of the ICC art. 25(1), opened for signature July 17, 1998, 37 I.L.M 999, 1016 (entered into force July 1, 2002) ..... 12

IN THE

# Supreme Court of the United States

No. 09-1262

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HER HUSBAND JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

*Petitioners*,

v.

TALISMAN ENERGY INC.,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Talisman Energy Inc. respectfully conditionally cross-petitions this Court for a writ of certiorari. If the Court grants petitioners' Petition for a Writ of Certiorari, it also should grant certiorari to review the judgment of the District Court with respect to the three Questions Presented.

These questions of subject matter jurisdiction necessarily and logically precede the questions presented by petitioners. If the District Court lacked subject matter jurisdiction under the Alien Tort Statute to adjudicate this action, then it is unnecessary for the Court to address the questions presented in petitioners' Petition.

## OPINIONS BELOW

The opinion of the Second Circuit is reported at 582 F.3d 244 (2d Cir. 2009), and reprinted in the petitioners' Petition at Pet. App. A. The opinion of the District Court is reported at 453 F. Supp. 2d 633 (S.D.N.Y. 2006), and reprinted in the petitioners' Petition at Pet. App. B.

## JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on October 2, 2009. Rehearing and rehearing en banc were denied on November 3, 2009. Petitioners' Petition was docketed on April 20, 2010. This Conditional Cross-Petition is filed pursuant to Supreme Court Rule 12.5 This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"), provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

## STATEMENT OF THE CASE

Petitioners, purporting to represent a class of hundreds of thousands of southern Sudanese, commenced

this action against Talisman Energy in November 2001. After adding the Government of Sudan as a defendant in a First Amended Complaint, petitioners filed a Second Amended Complaint in August 2003.

In their Second Amended Complaint, petitioners alleged that Talisman Energy conspired with the Government of Sudan to commit, or aided and abetted the Government of Sudan in committing, three crimes recognized under international law, *i.e.*, genocide, crimes against humanity, and war crimes.[1]

After Talisman Energy's motion to dismiss was denied, the parties proceeded to discovery, during which Talisman Energy produced approximately 1,000,000 pages of documents and the parties took 95 depositions, mainly outside the United States. In April 2006, Talisman Energy moved for summary judgment.

### A. The District Court Grants Talisman Energy Summary Judgment on Petitioners' Claims

The Southern District of New York (Cote, J.) granted Talisman Energy's motion for summary judgment. The District Court followed this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and held that under the ATS any norm of complicit liability upon which a claim is based must be found in international law, not federal common law. The court then considered whether international law recognized conspiracy liability and held

---

[1] As the Second Circuit recognized, petitioners "subsequently abandoned the claim of direct liability and elected to proceed against Talisman only on the claims of aiding and abetting and conspiracy." Pet. App. A-11.

that "the offense of conspiracy is limited to conspiracies to commit genocide and to wage aggressive war." Pet. App. B-57. Because petitioners never brought a claim for waging aggressive war and had abandoned their genocide claim, their conspiracy claim failed.

Next, the District Court undertook to define the elements of aiding and abetting liability under the ATS, as derived from international law. After a comprehensive survey of international law sources, the District Court held that:

> To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:
>
> 1. that the principal violated international law;
>
> 2. that the defendant knew of the specific violation;
>
> 3. that the defendant acted with the intent to assist the violation, that is, the defendant specifically directed his acts to assist in the specific violation;
>
> 4. that the defendant's acts had a substantial effect upon the success of the criminal venture; and
>
> 5. that the defendant was aware that the acts assisted the specific violation.

Pet. App. B-69.

As to petitioners' aiding and abetting genocide claim, the District Court held that petitioners had not produced admissible evidence that Talisman Energy was aware of any genocide in Sudan and, even if it was, that petitioners did not produce any

admissible evidence that Talisman Energy intended to further its commission. Pet. App. B-73.

As to aiding and abetting war crimes and crimes against humanity, the court identified the types of "substantial assistance" that petitioners alleged Talisman Energy provided: (1) upgrading airstrips; (2) designating certain areas for oil exploration; (3) providing financial assistance to the Government of Sudan through the payment of royalties; (4) giving general logistical support to the Sudanese military; and (5) various other acts. Pet. App. B-78.

The District Court held that the airstrips at issue were operated by Greater Nile Petroleum Operating Company Limited ("GNPOC"), the oil company in which Talisman Energy's indirect subsidiary held a 25% share, and that there was no evidence that Talisman Energy upgraded or improved those airstrips. Pet. App. B-84. The court also held that there was no evidence that Talisman Energy was involved in any discussions designating areas for expanded oil exploration, let alone that it considered such discussions to be a pretext for attacking civilians. Pet. App. B-85. The court found no admissible evidence that oil revenue resulted in increased military spending by the Government of Sudan. The court also held that, even assuming such a relationship existed, oil-related payments to the government of Sudan were insufficient to establish liability because there was no evidence that Talisman Energy specifically directed payments to military procurement or that it intended to aid international law violations. As to the construction of roads and the provision of fuel to the military, the court held that any such assistance was provided by GNPOC, not by Talisman Energy. Finally, the court held that there

was no admissible evidence that any other activities allegedly undertaken by Talisman Energy constituted "substantial assistance" in the commission of a violation of international law. Pet. App. B-90. Fundamentally, the court concluded that "[t]he activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry."[2] Pet. App. B-78.

Although not necessary for deciding the summary judgment motion, the District Court also analyzed whether petitioners could show that their injuries were caused by attacks initiated from airstrips within the GNPOC concession area and with GNPOC's assistance. The court held that only three petitioners were even "arguably" attacked with GNPOC's (not Talisman Energy's) assistance. Pet. App. B-91.

In ruling on Talisman Energy's motion for summary judgment, the District Court undertook an exhaustive review of the purported evidence petitioners submitted. Petitioners claim to have provided this Court with "[a] brief summary of the record . . . as context for the legal issues presented." Pet. 6. But as the District Court observed:

> the plaintiffs have not distinguished between the admissible and the inadmissible. The plaintiffs repeatedly described "'Talisman" as having done this or that, when the examination of the sources to which they refer reveals that it is some other entity or an employee of some other company that acted. They assert that this or that event

[2] The Second Circuit agreed with this conclusion. Pet. App. A-37-40

> happened, when the documents to which they refer consist of hearsay embedded in more hearsay. Indeed, most of the admissible evidence is either statements made by or to Talisman executives, and the plaintiffs' descriptions of their own injuries, with very little admissible evidence offered to build the links in the chain of causation between the defendant and those injuries.

Pet. App. B-7.

After analyzing all the evidence that petitioners produced, and applying the relevant legal standards, the District Court comprehensively addressed "an issue that applies to every civil lawsuit in this country as it nears trial," *i.e.*, "whether the plaintiffs have supplied sufficient admissible evidence to proceed to trial on their claims." Pet. App. B-8. The District Court's conclusion: "They have not." *Id.*

### B. The Second Circuit Unanimously Affirms the District Court's Grant of Summary Judgment

After the District Court granted Talisman Energy's motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b)—a motion necessitated by the failure of co-defendant the Government of Sudan to appear in the action—petitioners appealed.

The Second Circuit unanimously affirmed. In a decision authored by Chief Judge Dennis Jacobs, the Court of Appeals held that "under the principles articulated by the United States Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the standard for imposing accessorial liability under the ATS must be drawn from international law." Pet. App.

A-3. The court then carefully explored international law sources—treaties, judicial decisions, and commentary, to name just a few—in order to divine the appropriate rubric. Based on that exhaustive study, the Second Circuit concluded that, to establish accessorial liability under the ATS, "a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses." *Id.*

That was something the petitioners did not do. As the Second Circuit emphasized, "plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan." *Id.* Because petitioners offered no evidence suggesting that Talisman Energy acted with the specific purpose of facilitating human rights abuses, the Court of Appeals affirmed.

Petitioners filed a timely petition for rehearing and rehearing en banc, which the Second Circuit denied.

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Although petitioners' Petition presents no cert-worthy issue and should therefore be denied, if this Court grants the Petition, it should likewise grant this Conditional Cross-Petition. That is because the Conditional Cross-Petition raises important threshold questions of subject matter jurisdiction under the ATS: whether corporations can be held liable under the Act and whether it extends extraterritorially to acts that have no connection to the United States. The lower courts—which continue to struggle with the scope of the ATS and its applicability to an ever-expanding species of claims—would

benefit from this Court's guidance on these recurring questions of national importance.

If liability under the ATS for violations of international law does not extend to corporations and/or if it is improper for United States courts to exercise extraterritorial jurisdiction in a manner contrary to international law over ATS disputes arising wholly outside the United States, this Court's so holding now will spare litigants and the courts from wasting resources on such cases and will, consistent with the underlying objectives of the ATS, minimize, rather than provoke, friction between the United States and its sister States.

## I. CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL LAW UNDER THE ATS IS A FUNDAMENTAL JURISDICTIONAL QUESTION.

*Sosa* did not address the question of corporate liability for alleged violations of customary international law asserted under the ATS; indeed, the case did not involve a corporation at all. But this Court held in *Sosa* that questions concerning the scope of liability under the ATS, including whether such liability extends to a particular defendant, are governed by international law. 542 U.S. at 732 n.20.

Uniform application of that rule has proven elusive in the lower federal courts. Underscoring the confusion that has divided those courts, the Second Circuit's decision in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), produced three different and highly fractured opinions regarding corporate liability. Judge Katzmann opined that jurisdiction to hear a claim under the ATS depends on "whether the alleged tort was in fact committed in

violation of the law of nations . . . and whether *this* law would recognize the defendants' responsibility for that violation." *Id.* at 270 (emphasis added). He concluded, however, that "because the defendants have not objected to the imposition of liability on this basis, we need not reach the issue at this time." *Id.* at 283. Judge Hall concluded, with no apparent analysis, that corporate actors "are subject to liability under the ATCA." *Id.* at 289. Only Judge Korman fully considered the issue. In his partial dissent he concluded, after extensive analysis, that international law does not recognize corporate liability. *Id.* at 326.

In this case, a different panel of the Second Circuit properly construed *Sosa* to require resort to international law to address Talisman Energy's argument that ATS liability does not extend to corporations. The panel, however, declined to reach the question—as to which it requested and received post-argument briefing—of whether "corporations such as Talisman may be held liable for the violations of customary international law that plaintiffs allege." Pet. App. A-36. Instead, the court "assumed" that corporations may be liable in such cases "without deciding" the issue, stating: "Because we hold that plaintiffs' claims fail on other grounds, we need not reach, in this action, the question of 'whether international law extends the scope of liability' to corporations." *Id.* (quoting *Sosa*, 542 U.S. at 732 n.20).

More troubling still, a number of the federal courts of appeals have assumed, incorrectly, that such liability exists. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Abdullahi v. Pfizer Inc.*, 562 F.3d 163 (2d Cir. 2009); *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir.

2008); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003). If this Court grants petitioners' Petition, the Conditional Cross-Petition should be granted so that this Court can clarify the limited scope and purpose of the ATS.

## II. CORPORATE LIABILITY IS NOT RECOGNIZED IN INTERNATIONAL LAW.

*Sosa* holds that the jurisdiction of the federal courts to adjudicate claims under the ATS extends only to a narrow class of claims based on "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S. at 725. *Sosa* requires not only that the substantive norm at issue be so grounded in international law, but also that the same rigorous analysis establishes that liability for the violation extends to "the perpetrator being sued." *Id.* at 732 n.20.

The question, then, is whether there is a consensus among States, demonstrable with all the certainty that *Sosa* requires, that liability for violations of customary international law extends to corporations. There plainly is not.

No international tribunal has ever held a corporation liable for violating customary international law. Indeed, no organizational charter ever granted such a tribunal jurisdiction to do so. To the contrary, those charters, over a period of more than five decades, have consistently limited the jurisdiction of the tribunals they created to *natural*, not corporate, persons.

The London Charter establishing the International Military Tribunal at Nuremberg authorized the tribunal to "try and punish persons who . . . whether acting as individuals or as members of organizations" committed certain crimes. London Charter, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288. It did not confer jurisdiction over claims asserted against organizations or juridical persons.

The jurisdiction of each of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda likewise is limited by their respective organizational statutes to "natural persons." ICTY Statute, art. 6, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); ICTR Statute, art. 5, S.C. Res. 955, U.N. S/RES/955 (Nov. 8, 1994).

Nor are these charters outliers or relics of bygone eras. Most recently, the framers of the Rome Statute of the International Criminal Court, with 148 signatories, provided only for jurisdiction over "natural persons." The Rome Statute of the ICC art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M 999, 1016 (entered into force July 1, 2002). The reason why the jurisdiction of the ICC is limited to natural persons is particularly telling in light of *Sosa*'s requirement of universal acceptance: there was no consensus among the nations involved in drafting the

Rome Statute that its reach should extend to corporations. France's proposal to confer on the ICC jurisdiction over corporations:

> was . . . rejected for three principal reasons: (1) "from a pragmatic point of view it was feared that the ICC would be faced with tremendous evidentiary problems when prosecuting legal entities"; (2) "from a more normative-political point of view it was emphasized that the criminal liability of corporations is still rejected in many national legal orders, and international disparity which could not be brought in concord with the principle of complementarity"; and (3) "it was felt morally obtuse for States to insist on the criminal responsibility of all entities other than themselves."

*Khulumani*, 504 F.3d at 322-23 (quoting Albin Eser, Individual Criminal Responsibility, in 1 Antonio Cassese, *et al.*, The Rome Statute of the International Criminal Court: A Commentary 767, 778-79 (Oxford Univ. Press 2002)).

Further evidence that international law does not recognize corporate liability can be found in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"). The Torture Convention by its terms extends only to natural persons. *Khulumani*, 504 F.3d at 323. The U.S. Torture Victim Protection Act implementing the Torture Convention accordingly uses the term "individuals" to refer to those who are capable of violating the statute *and* those who have been subjected to torture, leading courts to conclude that the term "individuals" must refer solely to natural persons. *Id.*; *In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 56 (E.D.N.Y. 2005).

Finally, because international law is gleaned from the "customs and usages of civilized nations," *The Paquete Habana*, 175 U.S. 677, 700 (1900), it is especially significant that a 28-country survey carried out on Talisman Energy's behalf in response to the Second Circuit's request for post-argument briefing on the subject of corporate liability for violations of international law revealed *not a single* judicial decision recognizing such liability. Petitioners could not point to any such decision either.

In sum, neither the practices of States, the various ad hoc international tribunals, nor the Rome Statute recognizes the liability of corporations for violations of customary international law. There is simply no basis consistent with *Sosa* for United States courts to recognize such liability.

## III. THE EXTRATERRITORIAL APPLICATION OF THE ATS IS A FUNDAMENTAL JURISDICTIONAL QUESTION.

Although the issue was briefed in both cases, the Second Circuit did not address in this case or in *Khulumani* whether the federal courts have subject matter jurisdiction to adjudicate ATS claims asserted against foreign defendants for alleged conduct wholly outside the United States. If the ATS does not apply to such claims, then there is no federal subject matter jurisdiction to adjudicate them. Federal subject matter jurisdiction is equally lacking if adjudicating such a claim is in violation of international law or is inconsistent with *Sosa*'s admonition that courts must avoid creating new ATS causes of action without due regard to the practical consequences of so doing.

Like the issue of corporate liability under the ATS, these are fundamental jurisdictional questions lurk-

ing in many cases. This Court's defining the proper jurisdictional boundaries of the ATS might blunt the criticism of ATS litigation in the United States that has been voiced by foreign governments, including Canada (in this case) and the United Kingdom (which characterized the Apartheid action as one that "treats the Alien Tort Statute as a broad charter to extend United States jurisdiction beyond the limits well established and widely recognized under customary international law."). Brief for The United States as *Amicus Curiae* in Support of Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, App. 3a-4a, 128 S.Ct. 2484 (Mem.) (2008) (No. 07-919).

## IV. THE ATS DOES NOT APPLY TO ALLEGED TORTS IN VIOLATION OF INTERNATIONAL LAW COMMITTED IN THE SOVEREIGN TERRITORY OF ANOTHER STATE.

Whether Congress has sought to project its enactments beyond the territorial boundaries of the United States is a matter of statutory construction. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). The presumption against the extraterritoriality of Congressional acts requires that, unless a contrary legislative intent is clearly expressed, a legislative enactment be presumed primarily to be concerned with "domestic conditions." *Id.* (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949)).

Nothing in the text of the ATS vests the federal courts with a roving commission to adjudicate violations of international law across the globe. Nor does the ATS's legislative history hint at such a radical jurisdictional grant. To the contrary, the historical origins of the ATS indicate that Congress's intent

was far more modest: to create a federal forum to adjudicate only such disputes arising in the United States, or perhaps also on the high seas where no one country can claim jurisdiction.

In *Sosa*, Justice Souter, writing for a majority of the Court, analyzed extensively the origins of the ATS. He explained that the "Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Sosa*, 542 U.S. at 716 (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). Despite its efforts to encourage state legislatures to provide a judicial forum for suits to redress "injury done to a foreign power by a citizen," only a single state appears to have acted on the Continental Congress's recommendation. *Id.*

The need for a forum to address torts in violation of international law, and in particular transgressions upon foreign ambassadors in the United States, was highlighted by the Marbois incident. Marbois, a Secretary of the French Legion, was assaulted in Pennsylvania by another Frenchman, De Longchamps. *Id.* at 716. The French and the Dutch governments protested the incident, and Secretary Jay lamented that there was no federal forum in which to adjudicate the case. *Id.* at 717.

It is precisely that absence of a federal forum to address torts in violation of the law of nations that the First Congress sought to remedy in enacting the ATS. *Id.* The First Congress acted in response to a domestic incident in which the United States was seen by other States as having failed in its obligation to provide a forum to shape a remedy for a wrong committed on its soil. *Id.* at 716-17. There is no reason to believe that other nations would expect the

United States to provide a forum to redress an assault on a French ambassador if that assault occurred, for example, in Italy. Nor, therefore, is there any reason to believe that in enacting the ATS the First Congress intended to create a forum for a lawsuit involving such an assault, lacking as it does any nexus to the United States.

In light of this historical backdrop, there is no reason to suppose that the First Congress intended to vest the federal courts with subject matter jurisdiction to adjudicate torts in violation of the law of nations irrespective of where in the world those torts were committed. There certainly is no evidence of such an intent that is sufficient to overcome the presumption against extraterritoriality.

## V. ADJUDICATING IN THE UNITED STATES ATS CLAIMS AGAINST FOREIGN DEFENDANTS ARISING FROM CONDUCT WHOLLY OUTSIDE THE UNITED STATES IS INCONSISTENT WITH INTERNATIONAL LAW AND *SOSA*.

It is axiomatic that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The ATS is a jurisdictional statute, providing for federal subject matter jurisdiction only if the district court has the power to create a cause of action to adjudicate the alleged commission of what amounts to an international crime. *Sosa*, 542 U.S. at 724; *Khulumani*, 504 F.3d at 308-09 (Korman, J., concurring in part and dissenting in part) ("subject matter jurisdiction under the ATCA depends on whether the

defendants have violated an international law norm *which federal courts are prepared to recognize, accept and make available to litigants*") (emphasis in original). No such cause of action can properly be created, consistent with the *Charming Betsy* principle, if its adjudication would be inconsistent with international law.

In his concurring opinion in *Sosa*, Justice Breyer stated that in considering ATS cases courts must determine not only whether there exists among nations a consensus as to the substantive norms at issue and whether liability extends to a particular actor, but also a "procedural consensus" that the court has jurisdiction to adjudicate the dispute. 542 U.S. at 761-62 (concurring in part and concurring in the judgment). Questions about that procedural consensus arise most acutely in cases like this one where "foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm." *Id.* at 761.

International law recognizes the jurisdiction of States to regulate conduct pursuant only to certain principles legitimizing that power. The territoriality principle recognizes the authority of States to regulate conduct within a State's own territory. The nationality principle recognizes a State's authority to regulate the conduct of its own nationals. A State's regulation of conduct directed against the security of that State is consistent with the protective principle. Restatement (Third) of the Foreign Relations Law of the United States § 402 (1986).

The authority of a United States court to punish foreign defendants by imposing an adverse judgment in an ATS case for conduct occurring exclusively

outside the United States is not grounded in any of these principles. Nor could such a case, commenced as it must be by an "alien," properly invoke the passive personality principle, in accord with which States are permitted to exercise jurisdiction to redress wrongs committed against their nationals. *Id.*

Each of these principles is one that establishes a genuine link between the State exercising prescriptive jurisdiction and the underlying conduct at issue. International law requires that such a link exist to legitimize a State's exercise of jurisdiction. *See* John H. Currie, *Public International Law* 308 (2001) ("state practice discloses . . . the requirement of a genuine and effective link justifying the extension of a state's prescriptive jurisdiction to any particular person or transaction"); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (only proper to apply U.S. antitrust laws to foreign conduct to address domestic antitrust injury).

There is some support for the contention that international law recognizes the authority of States to exercise universal *criminal* jurisdiction over individuals to adjudicate a small subset of grave international law violations, including genocide, torture, and war crimes. Restatement (Third) of the Foreign Relations Law of the United States § 404 (1986). The underlying principle supporting universal criminal jurisdiction is to assure that there is an available forum to punish conduct violating the most fundamental norms of international law.

However, international law does not recognize any kind of "universal civil jurisdiction," and generally only recognizes the assertion of civil jurisdiction under circumstances that are reasonable. *Id.* at § 421(1). The assertion of civil jurisdiction to adjudi-

cate causes of action for violations of international law could only be universally accepted as reasonable under international law if, at the very least, it is asserted under circumstances that do not exceed the jurisdictional limits associated with universal criminal jurisdiction. Several such limits are important to the facts of this case:

1. There is no consensus among States that universal jurisdiction extends to aiding and abetting the commission of violations of even those international law norms over which States are expected to exercise universal criminal jurisdiction;

2. Where there is a State willing and able to exercise jurisdiction resting on one or more of the traditional jurisdictional bases (*e.g.*, the territoriality principle or the nationality principle), there is no basis for another State lacking such traditional jurisdictional bases to assert universal jurisdiction; and

3. The proper exercise of universal jurisdiction requires that the adjudicating State have custody of the accused.

Talisman Energy is not alleged to have committed genocide, war crimes, or crimes against humanity. With respect to the allegation that Talisman Energy aided and abetted their commission, the application of the first point to this case is plain.

As to the second point, Talisman Energy is a Canadian corporation subject to suit in Canada. The courts there could exercise jurisdiction to redress petitioners' claims consistent with international law based on the nationality principle. Consequently, there is no basis for a United States court to exercise universal jurisdiction in this case. And it offends the sovereignty of other States for a court in the United

States to sit in judgment over their citizens and corporations for acts having no connection to the United States.

The requirement that a State exercising universal jurisdiction have custody of the accused also was not met in this case. The District Court held that Talisman Energy was subject to its personal jurisdiction because the court pierced the corporate veil separating Talisman Energy from its subsidiary Fortuna Energy Inc., and attributed Fortuna Energy's New York contacts to Talisman Energy. The District Court went on to hold that those combined forum contacts were sufficient to support personal jurisdiction over Talisman Energy. There is no international consensus equating the concept of physical custody of a person with personal jurisdiction over a corporation based on its minimum contacts with a forum established by way of a state-law-specific veil piercing analysis. *See* Restatement (Third) of the Foreign Relations Law of the United States § 421(2)(c) (1986) (exercise of jurisdiction over a corporation is reasonable if corporation is organized pursuant to the laws of the State). In sum, even if the concept of universal civil jurisdiction were so well established in international law as to meet *Sosa*'s stringent test—and it is not—in this case there was no basis in international law for the District Court to exercise such jurisdiction.

Finally, *Sosa* erected a "high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary." 542 U.S. at 727. In this case, the Court need not speculate as to the *potential* implications for the foreign relations of the

United States associated with creating an ATS cause of action. In its amicus brief to the Second Circuit, the Government of Canada made several key arguments that make the *actual* foreign relations implications clear:

- "[a]pplying the ATS to Talisman on the facts presented below would violate th[e] fundamental principle of customary international law" that "requires a genuine and effective link between the nation seeking to assert jurisdiction and the persons or activities it seeks to regulate";
- adjudicating this case "fails to recognize the impact on Canada's important foreign policy as counseled by . . . *Sosa*"; and
- the "overly broad assertion of extraterritorial jurisdiction creates friction in Canada-United States relations."

Brief for The Government of Canada in Support of Dismissal of the Underlying Action, *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009) (07-0016-CV).

Because (i) the ATS does not apply to torts arising outside the United States; (ii) there was no basis consistent with international law to assert jurisdiction over the claims asserted; and (iii) the adverse practical consequences associated with adjudicating those claims are serious and apparent, the District Court lacked any basis to create a cause of action under the ATS. It therefore lacked subject matter jurisdiction over this dispute.

## CONCLUSION

For the reasons set forth above, if the Court grants petitioners' Petition for a Writ of Certiorari, it should also grant this Conditional Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

JOSEPH P. CYR *
MARC J. GOTTRIDGE
SCOTT W. REYNOLDS
ANDREW M. BEHRMAN
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
joe.cyr@hoganlovells.com

* Counsel of Record

*Counsel for Respondent*